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No. 533

In the Supreme Court of the United States

OCTOBER TERM, 1958

STEVE TANDARIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT ROBERT H. ROBINSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (3 R. 52–59; Pet. App. 5a–12a) [2] is reported at 257 F. 2d 895. The findings of fact and conclusions of law of the district court appear at 2 R. 37–40.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1958 (3 R. 60). A petition for rehear-

[1] The petition incorrectly lists the "United States of America" as respondent. The true respondent is "Robert H. Robinson, District Director, Chicago District, Immigration and Naturalization Service, United States Department of Justice" (see Pet. App. 1a, 5a).

[2] Volume 3 of the record is being lodged with the Clerk of this Court.

ing was denied on September 3, 1958 (3 R. 61). The petition for a writ of certiorari was filed on November 21, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, an alien who had legally resided in this country and who had left under a passport in which he assumed the identity of a deceased brother, was properly held deportable because he represented himself as a citizen of the United States on reentry and did not obtain an immigration visa.

2. Whether petitioner had a fair hearing.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations appear in the Appendix, *infra*, pp. 11–16.

STATEMENT

Petitioner, who was born at a place in Austria-Hungary which is now part of Yugoslavia, was legally admitted as a permanent resident of the United States on July 2, 1911, at the age of 3 (1 R. 4). He was never naturalized (2 R. 176). In 1937, he filed an application for a passport with the State Department in which he stated that he was Emil Tandarich and was born in Chicago, Illinois in 1912 (2 R. 181–182, 205–206).[1] In support, he presented a baptismal certificate which showed birth in the United States. Actually he had assumed his deceased brother's identity (2 R. 193, 205–206).[1] He left the United States and fought with the Loyalists in Spain (1 R. 4–5). Preliminary to his

[1] His brother Emil was born in this country.

return to the United States in 1939, he filed an application for registration in which he said that he was Emil Tandarich, born in Chicago in 1912 (2 R. 207–208). He then reentered the United States as Emil Tandarich, a native-born citizen. He was not in possession of a valid immigration visa and was not exempt from the presentation thereof (2 R. 202).

In December, 1944, a warrant of arrest was executed for his deportation on the grounds that he reentered the United States in 1939 not in possession of a valid immigration visa and that he admitted to having committed perjury prior to reentry (2 R. 202).

In July, 1946, an immigration hearing was held, during which petitioner testified. He admitted filing the application in which he claimed to be Emil Tandarich and claimed to be born in this country. In answer to the question whether he committed perjury in 1937, he said (2 R. 186): "I didn't think I perjured myself at the time but from the explanation I have now it would be perjury * * *." When asked if he committed perjury in 1939 before the Consular Officer at Barcelona, he said "I think I did" (2 R. 189). He said he used the name of his brother "as an expedient so as to make sure that I would get it [passport] and get back after the defeat of the Fascists of Europe" (2 R. 183).

The presiding officer found, as a result of the hearing, that petitioner was deportable (1) under the Immigration Act of 1924 on the grounds that he reentered the United States in 1939 not in possession of a valid immigration visa and was not exempted from the presentation thereof, and (2) under the

1917 Act in that he admitted to committing perjury prior to his reentry. At the same time petitioner's request for suspension or voluntary departure was denied (2 R. 169–171).

In March, 1947, the Commissioner of Immigration and Naturalization ordered the reopening of petitioner's case so that the offense of perjury could be accurately and sufficiently defined to petitioner (2 R. 160–163). The hearing was then reopened and the offense of perjury was defined to petitioner as follows: "* * * perjury is the willful and corrupt assertion of a falsehood material to the issue in the case made under oath or affirmation in the manner prescribed by the law before a person authorized to administer oaths" (2 R. 150–154). When asked if he committed perjury in 1939 before the Consular Officer at Barcelona, petitioner answered "I recognize that it amounts to perjury, but at the time action was taken, I did not think in the terms of perjury. I didn't recognize at the time that it was 'perjury.'" He said that the same answer applied to the 1937 statement (2 R. 128).

At this hearing, the government submitted in evidence a 1944 affidavit signed by petitioner in which he admitted the facts as to the application in his brother's name (2 R. 155–159). In that statement, expressing his understanding of the meaning of perjury, he said "False statement under oath" and then admitted perjury in his application for a passport in 1927 and application for registration in 1939 (2 R. 158–159). Following this hearing, the presiding inspector recommended that petitioner be deported on the same

grounds as found in the previous hearing (2 R. 123). The Acting Commissioner accepted the recommendation (2 R. 110–145).

On appeal, the Board of Immigration Appeals ordered that the hearing should be reopened (2 R. 138–139). After noting that petitioner had been held ineligible for suspension of deportation because of the admission of perjury, the Board said (2 R. 138): "We have serious doubts on the basis of the record before us, that respondent is subject to deportation on the criminal charge contained in the warrant of arrest." Since there appeared to be an issue as to affiliation with a subversive organization, the Board, before passing on the case, thought this issue should be explored. It ordered that the order and warrant of deportation be withdrawn, but it specifically said that it was not passing on the merits of the case.

A hearing was held in August, 1950 (2 R. 63–134). The hearing examiner who conducted the hearing stated at the outset that the purpose was to hear evidence on affiliation (2 R. 63) and that he had familiarized himself with the case, including the previous hearings. The hearing officer concluded that the evidence failed to show petitioner's affiliation or membership in a proscribed organization. The hearing officer did, however, concur in the earlier finding of petitioner's deportability by the presiding inspector (2 R. 62). The Assistant Commissioner of Immigration and Naturalization agreed with the recommendation and ordered petitioner's deportation (2 R. 40–47). On appeal to the Board of Immigration Appeals, the order was upheld. The Board found the

charge of entering without a visa sustained (2 R. 28). It also said (2 R. 28): "We have examined this record with great care and have read every line of testimony * * *. We have decided that respondent is guilty of perjury and that he has admitted it" (2 R. 27–31). The Board ruled that petitioner, having admitted a crime involving moral turpitude, was ineligible for suspension of deportation and that, in any event, suspension would be denied as an exercise of discretion (2 R. 31). Petitioner was finally ordered deported on March 27, 1957, and was taken into custody on March 29, 1957 (see 1 R. 31).

Petitioner initiated the present proceedings for judicial review and for declaratory and injunctive relief (1 R. 4–20). On October 8, 1957, the district court dismissed petitioner's complaint, holding that the order of deportation was supported by reasonable, substantial, and probative evidence (1 R. 37–40, 42–43). On appeal, the Court of Appeals affirmed (3 R. 60).

ARGUMENT

1. Petitioner contends that, as a nonquota immigrant under Section 4 (b) of the 1924 Act, he was not required to have an immigration visa to reenter in 1939, and that therefore his concealment of alienage in reentering in 1939 does not subject him to deportation under Sections 13 (a) and 14 of the Immigration Act of 1924 (*infra*, p. 13). This contention is without merit.

Section 13 (a) of the 1924 Act (*infra*, p. 13) specifically provides that a nonquota immigrant have a visa upon reentry. The fact that Section 13 (b)

(*infra*, p. 13) provides for the readmission "under [certain] conditions" of previously admitted aliens without a visa is of no avail to petitioner. This section on its face does not give a previously admitted alien an unqualified right to reenter. It grants a privilege of reentry without a visa only "under such conditions as may be by regulations prescribed." Petitioner did not seek readmission to this country under this section, and he cannot now claim a right to be readmitted under it. He made no attempt to conform to any of the conditions, seeking instead to conceal the fact that he was an alien and relying on his assumed citizenship and his brother's identity. Regardless of perjury, therefore, petitioner was clearly deportable as an alien who entered without a visa and without being exempt from such requirement.

Moreover, the finding that petitioner committed perjury as to a material matter was warranted. Petitioner was admitted as a citizen, thus thwarting any inquiry as to his admissibility as a alien. His knowingly false statements were made for the purpose of assuring his entry into the United States (see the Statement, *supra*). They were material on the issue of his admissibility to the United States. *Landon* v. *Clarke*, 239 F. 2d 631 (C. A. 1); *Duran-Garcia* v. *Neeley*, 246 F. 2d 287 (C. A. 5); *United States* v. *Reimer*, 96 F. 2d 217 (C. A. 2).

2. The various claims of lack of procedural due process are also without merit.

a. Petitioner's principal complaint seems to be that the Board of Immigration Appeals lacked authority

in 1947 to set aside the warrant of deportation and order an additional hearing on the question of his affiliation with a subversive organization and then to affirm the order of deportation on the basis of the evidence introduced at the prior hearings (Pet. 22-27). The Board had before it in 1947 not only the question of deportability, but the question of suspension of deportation. If petitioner were found to have committed perjury he would be ineligible for suspension of deportation, but the Board had some question as to that finding. That issue might not have to be reached, however, if petitioner proved to be a member of a subversive organization. Manifestly, it was in the power of the Board, before undertaking to pass on the case before it, to have the record complete as to all issues which had a bearing on the question of suspension which the Board was being asked to decide. The opinion of the Board directing the reopening made clear that the Board was not deciding the question of perjury. When it later became necessary to do so (there being no finding of membership in a subversive organization), the Board correctly ruled that petitioner had committed perjury.

Since the order of the Board directed the reopening for the purpose of adducing evidence on the issue of affiliation, there was no occasion to reintroduce the evidence already of record bearing upon the other issues.

b. The claim that petitioner did not receive adequate notice of the purpose of the reopened hearing because the formal notice of hearing did not specify the purpose (Pet. 22) is frivolous. The order of the

Board of Immigration Appeals had put petitioner on notice of the issue to be explored at the reopened hearing. At the outset of the reopened hearing, the presiding officer stated the purpose of the hearing and neither petitioner nor his counsel made any claim of surprise or any request for adjournment.

c. Petitioner also asserts that it was improper to introduce in evidence, at the 1947 hearings, a signed statement made by him in 1944 before a representative of the Immigration and Naturalization Service (Pet. 21). He points to the regulation (8 C. F. R. 150.1 (c) (1947 Supp.)) which provides that the person giving a recorded statement shall be warned that any statement made by him may be used as evidence in subsequent proceedings. Petitioner offered no evidence that he had not been so warned. Moreover, all the facts admitted in that statement were testified to by petitioner himself, both at the 1946 and 1947 hearings.

d. The allegation that there was error in refusing to consider and grant voluntary departure and preexamination (Pet. 18–20) is answered by the opinion of the Board of Immigration Appeals. The Board said (2 R. 31):

> In the alternative respondent has applied for a grant of voluntary departure, preexamination, and readmission under the 7th Proviso. We do have authority to grant this relief but for the same reasons that we have set forth for denying suspension of deportation we specifically deny the alternative relief. A grant of voluntary departure, preexamination, and readmission under the 7th Proviso is extraor-

dinary relief available only to one who can demonstrate merit. The respondent is not such a person.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1958.

APPENDIX

The pertinent statutes and regulations provide as follows:

Immigration Act of 1917 (39 Stat. 874):

> Section 3. That the following classes of aliens shall be excluded from admission into the United States: * * * persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; * * *
>
> * * * * *
>
> Sec. 15. That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or to send competent assistants to the vessel and there inspect all such aliens * * *.
>
> * * * * *
>
> Sec. 19. (a) That at any time * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported: * * *
>
> * * * * *

Immigration Act of 1924 (43 Stat. 153, 8 U. S. C. 201):

> Sec. 4. When used in this Act the term "non-quota immigrant" means—
>
> * * * * *
>
> (b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;
>
> * * * * *

Sec. 8. A consular officer may, subject to the limitations provided in sections 2 and 9, issue an immigration visa to a non-quota immigrant as such, upon satisfactory proof, under regulations prescribed under this Act, that the applicant is entitled to be regarded as a non-quota immigrant.

* * * * * *

Sec. 10. (a) Any alien about to depart temporarily from the United States may make application to the Commissioner of Immigration and Naturalization for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.

(b) If the Commissioner of Immigration and Naturalization finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Attorney General, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.

(c) On good cause shown the validity of the permit may be extended for such period or periods, not exceeding six months each, and under such conditions, as shall be by regulations prescribed.

(d) For the issuance of the permit, and for each extension thereof, there shall be paid a fee of $3, which shall be covered into the Treasury as miscellaneous receipts.

(c) Upon the return of the alien to the United States the permit shall be surrendered to the immigration officer at the port of inspection.

(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning.

* * * * *

SEC. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; (2) is of the nationality specified in the visa in the immigration visa; (3) is a nonquota immigrant if specified in the visa in the immigration visa as such; (4) is a preference-quota immigrant if specified in the visa in the immigration visa as such; and (5) is otherwise admissible under the immigration laws.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

* * * * *

SEC. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported * * *.

* * * * *

SEC. 25. The provisions of this Act are in addition to and not in substitution for the pro-

visions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.

* * * * * *

8 C. F. R. (1947 Supp.) 132.P:

Aliens returning to unrelinquished domicile, domicile defined. Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General and under such conditions as he may prescribe. In such case satisfactory proof of domicile in the United States for seven consecutive years, and of departure therefrom with the intention of returning thereto, will be exacted. Every case of exclusion for any cause in which the alien has given such proof, shall be promptly brought by the official in charge to the attention of the Attorney General, through the usual official channels, with a complete report of the reasons for the alien's exclusion and of the proof which has been offered of continuous and unrelinquished domicile, together with a statement of the duration of the absence. Domicile, for the purposes of this section, means that place where a person has his true, fixed, and permanent home, and principal establishment, to which, whenever he is absent, he has the intention of returning.

* * * * * *

8 C. F. R. (1947 Supp.) 164.1:

Qualifications. Any alien who is a lawful permanent resident of the United States and who is about to depart temporarily therefrom may make application for a permit to reenter the United States.

8 C. F. R. (1947 Supp.) 164.2:

Application; form; fee. The application for a permit to reenter the United States shall be made, under oath, on Form I-131, which may be obtained from any office of the Immigration and Naturalization Service, and should be submitted at least 30 days before the proposed date of departure, to the Commissioner of Immigration and Naturalization or to the immigration and naturalization office prescribed in § 60.30 (a) of this chapter. A separate application must be made for each applicant. A parent or guardian may file an application in behalf of a child who is under the age of 14 years. Each application shall be accompanied by the statutory fee of $3, remitted as prescribed in § 60.30 (b) of this chapter. Each application shall also be accompanied by two photographs of the applicant, which shall meet the specifications in § 364.1 of this chapter. The application shall include—(a) name currently used; (b) time, place, and manner of last recorded arrival in the United States; (c) name used at time of entry; (d) father's name and mother's maiden name; (e) age, marital status, and occupation at time of entry; (f) place and date of birth; (g) last permanent residence and name and address of nearest relative in country whence alien came; (h) name and address of person to whom destined at time of last entry; (i) personal description as of date of filing application; (j) by whom accompanied at time of last entry; (k) address in the United States, and what temporary ad-

dress abroad will be; (l) marital status at the date of filing application, and if married the name and address of husband or wife; (m) nature of business or employment and name of employer; (n) port and date of proposed departure, name of vessel on which sailing, length of proposed absence, and reasons for going abroad.

* * * * *

8 C. F. R. (1947 Supp.) 164.4:

* * * (a) If the Commissioner of Immigration and Naturalization finds that the applicant has the qualifications specified in § 164.1 and that the application is made in good faith, he shall issue the permit and it shall be valid for the time therein specified, not to exceed one year. Such permit will, however, have no effect under the immigration laws except to show that the alien to whom it is issued is returning from a temporary visit abroad.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE 1958